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7 IN THE UNITED STATES DISTRICT COURT  
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9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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11 E.M., a minor, by and through his parents,  
12 E.M. and E.M.,

No. C-06-4694 MMC

13 Plaintiff,

**ORDER GRANTING JUDGMENT IN  
FAVOR OF DEFENDANT**

14 v.

15 PAJARO VALLEY UNIFIED SCHOOL  
16 DISTRICT,

Defendant.

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18 Before the Court is plaintiff E.M.'s Brief on Remand, filed December 2, 2011.  
19 Defendant Pajaro Valley Unified School District ("PVUSD") has filed a response, to which  
20 E.M. has replied. The matter came on regularly for hearing January 20, 2012. Mandy G.  
21 Leigh of the Leigh Law Group appeared on behalf of E.M. Kimberly A. Smith of Fagen  
22 Friedman & Fulfrust, LLP, appeared on behalf of PVUSD. Having read and considered the  
23 parties' respective written submissions,<sup>1</sup> including the administrative record lodged with the  
24 Clerk of the Court on December 6, 2011, and having considered the arguments made at  
25 the hearing, the Court rules as follows.

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28 <sup>1</sup>PVUSD's objections to portions of E.M.'s reply are hereby OVERRULED, and  
E.M.'s motion to strike PVUSD's sur-reply is hereby GRANTED.

## BACKGROUND

2 E.M. is a minor who was enrolled as a student in PVUSD schools beginning in 1999,  
3 when he enrolled in kindergarten, and ending in 2008, when his family moved to another  
4 district. E.M. alleges he is a disabled student who, pursuant to the Individuals with  
5 Disabilities Education Act (“IDEA”), was entitled to receive special education services while  
6 he was enrolled in PVUSD schools.

In 2004 and in 2005, PVUSD found E.M. was not eligible for special education. (See Administrative Record (“AR”) 267.) Thereafter, on December 5, 2005, E.M. filed a “due process” complaint with the Office of Administrative Hearings (see AR 1-16), which, as amended January 4, 2006 (see AR 59-78), alleged he was eligible for special education under the IDEA “as a child primarily with a learning disability and also as a child as having an other health impairment due to his auditory processing deficits” (see AR 73). In a pre-hearing filing, E.M. additionally alleged the PVUSD failed to comply with the IDEA by not assessing him for “attention deficit disorder” (“ADD”) and “attention deficit hyperactivity disorder” (“ADHD”). (See AR 122, 177.) At a pre-hearing conference, the administrative law judge (“ALJ”) struck, on untimeliness grounds, E.M.’s ADD/ADHD allegations (see AR 177), and, after conducting a six-day evidentiary hearing, issued a decision finding E.M. had failed to establish he had a “specific learning disability” (see AR 263, 274), and, consequently, found he was not entitled to special education services under the IDEA (see AR 263).<sup>2</sup>

21 On August 2, 2006, E.M. filed the instant action. In the operative complaint, the  
22 Second Amended Complaint (“SAC”), filed June 12, 2008, E.M. alleges that the ALJ  
23 “wrongly decided the case” (see SAC ¶ 56), that E.M. “had an auditory processing disorder”  
24 (see SAC ¶ 27), that PVUSD staff and E.M.’s parents “thought [he] had ADD/ADHD” (see  
25 SAC ¶ 47), and that E.M. was entitled to “special education and related services under the  
26 eligibility category of SLD [specific learning disability]” and “under other eligibility

<sup>28</sup> <sup>2</sup>The ALJ did not expressly decide whether E.M. had an “other health impairment” that would make him eligible for special education.

1 categories" (see SAC ¶¶ 43, 44).

2 On October 17, 2008, the Honorable Jeremy Fogel, the district judge to whom the  
 3 matter was then assigned, remanded the matter to the ALJ. Specifically, Judge Fogel  
 4 found certain of the ALJ's findings of fact and conclusions of law were conclusory, and  
 5 directed the ALJ to "set forth more completely his reasoning." (See Order, filed October 17,  
 6 2008, at 5.) On May 29, 2009, the ALJ issued a Decision Following Remand, in which the  
 7 ALJ more completely set forth the basis for his reasoning.<sup>3</sup> On August 27, 2009, following  
 8 additional briefing by the parties, Judge Fogel granted PVUSD's motion for summary  
 9 judgment and denied E.M.'s motion for summary judgment. In particular, Judge Fogel  
 10 found E.M. failed to show he had a specific learning disorder and that the ALJ had not  
 11 erred by striking E.M.'s ADD/ADHD allegations. Judgment subsequently was entered in  
 12 favor of PVUSD.

13 On July 14, 2011, the United States Court of Appeals for the Ninth Circuit affirmed in  
 14 part and reversed and remanded in part. See E.M. v. Pajaro Valley Unified Sch. Dist., 652  
 15 F.3d 999 (9th Cir. 2011). Specifically, the Ninth Circuit affirmed Judge Fogel's decision  
 16 granting summary judgment to PVUSD on E.M.'s claim that he "qualified for special  
 17 education and related services as a child with ADD/ADHD," see id. at 1007, reversed  
 18 Judge Fogel's finding that E.M. had failed to show he had a specific learning disability, with  
 19 directions to reconsider said finding after "consider[ing]" whether two reports created after  
 20 the administrative hearing were admissible, see id. at 1006, and further directed the district  
 21 court to determine E.M.'s claim that his "auditory processing disorder diagnosis qualified  
 22 him for special education as a child with an 'other health impairment,'" see id. at 1006-07.<sup>4</sup>

23 On remand, the matter was reassigned to the undersigned, and the parties  
 24 subsequently filed briefs to address the issues identified by the Ninth Circuit.

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26 <sup>3</sup>The Decision Following Remand is filed in the instant action as Document No. 132.

27 <sup>4</sup>With respect to the "other health impairment" claim, the Ninth Circuit found E.M.  
 28 had not waived the claim, that the ALJ "apparently ignored" it, and that Judge Fogel "did not  
 consider it." See id. at 1006.

## **STANDARD OF REVIEW**

2        "In evaluating a complaint under the IDEA, the district court shall receive the record  
3 of the [state] administrative proceedings, shall hear additional evidence at the request of a  
4 party, and, basing its decision on the preponderance of the evidence, shall grant such relief  
5 as the court determines is appropriate." Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493,  
6 1499 (9th Cir. 1996) (alteration in original; internal quotation and citation omitted). "The  
7 Ninth Circuit has interpreted [the IDEA] as calling for de novo review." Id. "[I]t has  
8 cautioned," however, that the district court "must give deference to the state hearing  
9 officer's findings, particularly when . . . they are thorough and careful." Id. "[C]ourts are not  
10 permitted simply to ignore the administrative findings." Ojai Unified Sch. Dist. v. Jackson, 4  
11 F.3d 1467, 1474 (9th Cir. 1993) (internal quotation and citation omitted), cert. denied, 513  
12 U.S. 825 (1994).

13 E.M. challenges the findings made by the ALJ, and, accordingly, has the burden of  
14 establishing his entitlement to relief under the IDEA. See Hood v. Encinitas Union Sch.  
15 Dist., 486 F.3d 1099, 1103 (9th Cir. 2007) (“The burden of proof in the district court rest[s]  
16 with the . . . party challenging the administrative decision.”).

## DISCUSSION

Under the IDEA, a state must provide a “free appropriate public education” to children with disabilities. See 20 U.S.C. § 1412(a)(1)(A). A state must, inter alia, identify and evaluate children with disabilities, see 20 U.S.C. § 1412(a)(3)(A), and develop an “individual education program” for each disabled child, see 20 U.S.C. § 1412(a)(4).

22 | "The term 'child with a disability' means a child --

23 (i) with intellectual disabilities, hearing impairments (including deafness),  
24 speech or language impairments, visual impairments (including blindness),  
25 serious emotional disturbance (referred to in [the IDEA] as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

26 (ii) who, by reason thereof, needs special education and related services. “

<sup>27</sup> See 20 U.S.C. § 1401(3)(A) (emphasis added).

28 E.M. alleges PVUSD failed to properly identify and evaluate him as a child with a

1 disability. In particular, E.M. alleges he has an auditory processing disorder, and that, as a  
 2 result of the effects thereof, he was entitled to special education services under the  
 3 categories of “specific learning disability” and/or “other health impairment.” As was  
 4 discussed at the January 20, 2012 hearing, the Court finds, and counsel for the parties  
 5 agree, the proper procedure for resolving the remaining claims is a bench trial on the  
 6 record as discussed herein. See, e.g., Ojai Unified Sch. Dist., 4 F.3d at 1472 (holding,  
 7 where disputed issues of fact exist, IDEA claim must be resolved by “bench trial on a  
 8 stipulated record”). Accordingly, the instant order sets forth below the Court’s findings of  
 9 fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

10 At the outset, the Court addresses the Ninth Circuit’s direction to consider whether a  
 11 Psychological Assessment, written in December 2007 by Cheryl Jacques, Psy.D. (“Dr.  
 12 Jacques’ Assessment”)<sup>5</sup> and a Report of Assessment for Special Education, written in  
 13 February 2008 by a PVUSD “assessment team” (“PVUSD 2008 Assessment”)<sup>6</sup> are  
 14 “relevant, non-cumulative, and otherwise admissible.” See E.M., 652 F.3d at 1006.

15 Dr. Jacques’ Assessment includes a finding that, in December 2007, a “severe  
 16 discrepancy” existed between E.M.’s intellectual ability and academic achievements; as  
 17 discussed below, whether such discrepancy existed in 2004 or 2005 is at issue in the  
 18 instant case. The PVUSD 2008 Assessment includes a finding that, in 2008, E.M. had a  
 19 specific learning disability entitling him to special education services. Although, as PVUSD  
 20 points out, the findings in both Dr. Jacques’ Assessment and the PVUSD 2008 Assessment  
 21 are based on testing conducted after the administrative hearing, the Court finds the two  
 22 assessments tend to shed some light on the nature of E.M.’s asserted impairments in 2004  
 23 and 2005, and, consequently, are relevant to E.M.’s remaining claims. See Ojai Unified  
 24 Sch. Dist., 4 F.3d at 1473 (holding district court has discretion to admit “evidence  
 25 concerning relevant events occurring subsequent to the administrative hearing”). The

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26  
 27 <sup>5</sup>Dr. Jacques’ Assessment is filed as Exhibit B to E.M.’s Brief on Remand, and also  
 as Exhibit A to the Declaration of Sarah Fairchild, filed February 21, 2008.

28 <sup>6</sup>The PVUSD 2008 Assessment is filed as Exhibit A to E.M.’s Brief on Remand.

1 Court further finds neither assessment is cumulative of evidence in the administrative  
 2 record; the assessments address testing and observations occurring after the  
 3 administrative hearing. Lastly, PVUSD points to no reason, and the Court has found none,  
 4 suggesting the assessments, if relevant and non-cumulative, nonetheless are inadmissible.

5 Accordingly, the Court hereby grants E.M.'s request to supplement the record with  
 6 Dr. Jacques' Assessment and the PVUSD 2008 Assessment. The Court next turns to the  
 7 merits of E.M.'s claims.

8 **A. Specific Learning Disability**

9 **1. Definition of Specific Learning Disability**

10 During the time period in which PVUSD made the determinations at issue herein, the  
 11 Code of Federal Regulations defined "specific learning disability" as follows:

12 (i) General. The term means a disorder in one or more of the basic  
 13 psychological processes involved in understanding or in using language,  
 14 spoken or written, that may manifest itself in an imperfect ability to listen,  
 15 think, speak, read, write, spell, or to do mathematical calculations, including  
 16 conditions such as perceptual disabilities, brain injury, minimal brain  
 17 dysfunction, dyslexia, and developmental aphasia.

18 (ii) Disorders not included. The term does not include learning problems that  
 19 are primarily the result of visual, hearing, or motor disabilities, of mental  
 20 retardation, of emotional disturbance, or of environmental, cultural, or  
 21 economic disadvantage. "

22 See 34 C.F.R. § 300.7(c)(10) (2005).

23 During that same period, the California Education Code set forth the standards  
 24 applicable to a determination as to whether a student has a "specific learning disability,"  
 25 which standards the Ninth Circuit has found applicable in the instant action. See E.M., 652  
 26 F.3d at 1003. Under the applicable state law, "[a] pupil shall be assessed as having a  
 27 specific learning disability which makes him or her eligible for special education and related  
 28 services when it is determined that all the following exist:

29 (a) A severe discrepancy exists between the intellectual ability and achievements in  
 30 one or more of the following academic areas:

31 (1) Oral expression.  
 32 (2) Listening comprehension.

- (3) Written expression.
- (4) Basic reading skills.
- (5) Reading comprehension.
- (6) Mathematics calculation.
- (7) Mathematics reasoning.

(b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages.

(c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program."

See Cal. Educ. Code § 56337 (2005).

## 2. Application

As noted, a “specific learning disability” exists when a pupil has a “disorder in one or more of the basic psychological processes” that causes certain specified effects. See 34 C.F.R. § 300.7(c)(10) (2005); Cal. Educ. Code § 56337 (2005). “Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.” Cal. Code Regs. tit. 5, § 3030(j)(1) (2005) (emphasis added).

As discussed below, although the Court finds E.M. has established he had, at the time PVUSD made the assessments challenged herein, an auditory processing disorder, i.e, a “disorder in one or more of the basic psychological processes,” E.M. has failed to show he had a “specific learning disability” at that time.

### **a. Disorder in Basic Psychological Process**

In its opinion, the Ninth Circuit “agree[d]” with E.M.’s argument on appeal that “the district court improperly concluded that he failed to establish that he suffered from a ‘disorder in a basic psychological process,’” noting the administrative record contained evidence showing one audiologist had “diagnosed E.M. with an auditory processing disorder” and that a second audiologist “could not rule out an auditory processing disorder diagnosis.” See E.M., 652 F.3d at 1003. The Court understands the Ninth Circuit to have ruled that, on the record before Judge Fogel, it was undisputed that E.M. had a “disorder in a basic psychological process,” specifically, “an auditory processing disorder.” On remand,

1 this Court is bound by the Ninth Circuit's ruling. See Insurance Group Comm. v. Denver &  
 2 R.G.W.R. Co., 329 U.S. 607, 612 (1947) ("When matters are decided by an appellate court,  
 3 its rulings, unless reversed by it or a superior court, bind the lower court.").

4 Assuming, however, the Ninth Circuit, as PVUSD argues, left the issue open for  
 5 reconsideration on remand,<sup>7</sup> the Court, having considered *de novo* the evidence in the  
 6 administrative record, finds E.M., during the time period in which PVUSD made the  
 7 determinations at issue, had an auditory processing disorder. (See, e.g., AR 118-30,  
 8 1958). This finding is further supported by the PVUSD 2008 Assessment, which includes  
 9 findings consistent with E.M.'s having an auditory processing disorder in February 2008  
 10 (see Pl.'s Brief on Remand Ex. A at 31),<sup>8</sup> and the record reflects no event occurring after  
 11 2004/2005 and before 2008, or any other evidence, indicative of a late onset of said  
 12 disorder.

13 Accordingly, the Court finds E.M. has a disorder in a basic psychological process,  
 14 specifically, an auditory processing disorder. See Cal. Code Regs. tit. 5, § 3030(j)(1)  
 15 (2005).

16 **b. "Severe Discrepancy"**

17 As discussed above, a student is eligible for special education as a child with a  
 18 specific learning disability where "a 'severe discrepancy' . . . between the child's intellectual  
 19 ability and achievement in one or more of seven designated academic areas" exists. See  
 20 E.M., 652 F.3d at 1003.

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 24 <sup>7</sup>Because Judge Fogel found PVUSD was entitled to "summary judgment," the Ninth  
 25 Circuit reviewed his findings "de novo." See E.M., 652 F.3d at 1002. Consequently, the  
 26 Ninth Circuit may have found that because the administrative record included evidence to  
 27 support a finding that E.M. had an auditory processing disorder, a triable issue remained for  
 28 determination by the finder of fact.

27 <sup>8</sup>For example, the PVUSD 2008 assessment, in reference to testing done in early  
 28 2008, noted that although E.M. had "very well developed word recognition/phonic skills  
 while reading," he exhibited "poor performance" on "auditory memory subtests administered  
 without any visual cues/prompts." (See id.)

1       The California Code of Regulations provides that a district “shall use” certain  
 2 specified “procedures” to determine whether a child has the requisite “severe discrepancy.”  
 3 See Cal. Code Regs. tit. 5, § 3030(j)(4) (2005). As correctly summarized by the ALJ, the  
 4 state regulation in effect at the time of PVUSD’s challenged assessments provided that a  
 5 “severe discrepancy between ability and achievement is found when the difference in  
 6 standard scores is at least 22.5 points . . . , adjusted by 4 points, which is one standard  
 7 error of measurement.” (See Decision Following Remand at 15.) “This computed  
 8 difference constitutes a severe discrepancy when ‘such discrepancy is corroborated by  
 9 other assessment data which may include other tests, scales, instruments and work  
 10 samples, as appropriate.’” (See id. (quoting Cal. Code Regs. tit. 5, § 3030(j)(4)(A) (2005).)

11       When it assessed E.M. in 2004 and 2005, PVUSD found the requisite discrepancy  
 12 did not exist. After conducting an evidentiary hearing, the ALJ found PVUSD did not err in  
 13 that regard, and, on judicial review, Judge Fogel likewise found no error by PVUSD. On  
 14 appeal, the Ninth Circuit observed that a “severe discrepancy” would have been found had  
 15 the PVUSD used the results of another standardized intelligence test, as opposed to the  
 16 results of the standardized test upon which PVUSD relied, and framed the issue as  
 17 “whether PVUSD’s choice among test scores was reasonable.” See E.M., 652 F.3d at  
 18 1004 (holding “a school district, considering all relevant material available on a pupil, must  
 19 make a reasonable choice between valid but conflicting test results in determining whether  
 20 a ‘severe discrepancy’ exists”). In light of the above-referenced unresolved issues as to the  
 21 admissibility of the additional evidence, however, the Ninth Circuit did not reach the issue of  
 22 whether PVUSD’s choice among test scores was reasonable; rather, it remanded the  
 23 matter for further consideration of that issue, which, as set forth below, this Court now  
 24 addresses.

25       The ALJ concluded the appropriate “achievement” score to be used for purposes of  
 26 the “severe discrepancy” analysis was E.M.’s “lowest standard score in any of the [relevant]  
 27 academic areas” (see Decision Following Remand at 9), which score the ALJ found was  
 28 E.M.’s “score of 87 on the ‘auditory interpretation of directions’ subtest” of a standardized

1 test administered by PVUSD in the fall of 2004 (see id. at 9-10).<sup>9</sup> No party has disagreed  
 2 with the ALJ's finding on such issue, and the Court finds it proper to give deference thereto.

3       The appropriate "ability" score to be used for purposes of the "severe discrepancy"  
 4 analysis was a disputed issue before the ALJ, and remains disputed in district court. As of  
 5 the time of the administrative hearing, E.M. had been given three standardized intelligence  
 6 tests and had received a different score on each test. Specifically, he received (1) a score  
 7 of 104 on the Wechsler Intelligence Scale for Children - Third Edition ("WISC-III"), as  
 8 administered in July 2004 by Roslyn Wright, Psy.D. ("Dr. Wright"), who had been retained  
 9 by E.M.'s parents; (2) a score of 111 on the Kaufman Assessment Battery for Children ("K-  
 10 ABC"), administered in October 2004 by Leslie Viall ("Viall"), M.S., Psychology, a PVUSD  
 11 school psychologist; and (3) a score of 98 on the Test of Nonverbal Intelligence ("TONI"),  
 12 also administered by Viall. (See id. at 7-8.) E.M. argues the K-ABC score should have  
 13 been used, and relies on testimony provided by Dr. Wright at the evidentiary hearing, while  
 14 PVUSD, relying on the testimony provided by Viall, argues its decision to employ the  
 15 WISC-III score was reasonable.

16       The ALJ summarized the testimony provided on this issue, and explained why he  
 17 found Viall more persuasive than Dr. Wright, as follows:

18       School Psychologist Leslie Viall's testimony established that the performance  
 19 score on the WISC-III of 104 is the valid measure of [E.M.'s] intellectual  
 20 ability. Ms. Viall is a credentialed school psychologist with more than 15  
 21 years experience administering educational assessments to children. She  
 22 testified that the WISC is the most common intelligence quotient test  
 23 administered to children, as well as the best predictor of school performance.  
 24 Ms. Viall administered the K-ABC when she assessed [E.M.] in October 2004  
 25 only because the parents' assessor, Dr. Wright, had recently administered the  
 26 WISC-III. If Ms. Viall had administered the WISC-III less than four months  
 27 after Dr. Wright's administration, Ms. Viall would have obtained an invalid  
 28 score. When Ms. Viall obtained a significantly higher score on the K-ABC  
 29 (111), she administered another intelligence test, the [TONI,] to obtain more  
 30 information. [E.M.'s] TONI score of 98 was consistent with [E.M.'s]  
 31 performance score on the WISC-III, not the inflated score on the K-ABC.

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27       <sup>9</sup>According to testimony given at the administrative hearing, the results of the subtest  
 28 provide a "valid measure of a child's 'listening comprehension.'" (See id. at 10.) As noted,  
 "listening comprehension" is one of the "academic areas" identified in § 56337.

1 Accordingly, Ms. Viall determined that 104 was the most reliable, valid  
 2 measure of [E.M.'s] intellectual ability.

3 [E.M.'s] expert, Dr. Wright[,] testified that the K-ABC score of 111 was the  
 4 appropriate measure of [E.M.'s] intellectual ability. Dr. Wright's testimony was  
 5 not credible on this point. First, Dr. Wright never explained why the K-ABC  
 6 score should be used instead of the WISC-III score she obtained. Indeed,  
 7 her own report states that the performance score on the WISC-III was an  
 8 accurate measure of [E.M.'s] "true cognitive potential." Second, as explained  
 9 above, the WISC-III performance score was corroborated by the TONI score  
 10 while the K-ABC score was not corroborated by any score or observation.  
 11 Third, Dr. Wright's testimony was not generally credible because she made  
 12 recommendations that were not supported by the facts and were clearly not  
 13 within her area of expertise.

14 (See id. at 8-9.)

15 Finding Viall's testimony to be persuasive, the ALJ concluded that "the WISC-III  
 16 performance score of 104 [was] a better measure of [E.M.'s] cognitive ability than his K-  
 17 ABC score of 111." (See id. at 10.) Having selected the scores he determined to provide  
 18 the most valid measures of E.M.'s ability and achievement (104 and 87, respectively), the  
 19 ALJ concluded PVUSD had not erred in finding a "severe discrepancy" was not shown,  
 20 because, as the ALJ observed, the difference between said scores was "17 points, far less  
 21 than the requisite 22.5 points required by applicable law." (See id.)

22 This Court, having reviewed the record of the administrative hearing and the ALJ's  
 23 Decision Following Remand, finds the ALJ's findings are properly characterized as  
 24 "thorough and careful," and, consequently, entitled to deference. See R.B. v. Napa Valley  
Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007).<sup>10</sup> Further, having conducted its own  
 25 de novo review of the evidence in the administrative record, the Court finds E.M. has not  
 26 met his burden to show it was unreasonable for PVUSD to use the WISC-III test score.  
 27 Several different standardized tests were given to E.M., and differing results were obtained.  
 28 Viall testified in detail as to why the K-ABC test result was the least reliable indicator of

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29  
 30 <sup>10</sup>As the Ninth Circuit has held, a hearing officer's findings are "thorough and careful"  
 31 where the hearing officer "participates in the questioning of witnesses and writes a decision  
 32 containing a complete factual background as well as a discrete analysis supporting the  
 33 ultimate conclusions." See id. (internal quotation and citation omitted). Here, the ALJ  
 34 actively questioned the witnesses, and the Decision on Remand comports with the  
 35 standards identified by the Ninth Circuit.

1 E.M.'s intellectual abilities, and the Court finds, for the reasons stated by the ALJ, Viall's  
 2 testimony was credible.

3 Accordingly, the Court finds PVUSD's assessments in 2004 and 2005 were, based  
 4 on the evidence available at the time those assessments was made, reasonable. See  
 5 E.M., 652 F.3d at 1004 (holding school district has duty to "make a reasonable choice  
 6 between valid but conflicting test results in determining whether a 'severe discrepancy'  
 7 exists").

8 The Court next considers whether that determination is altered by the addition of the  
 9 after-acquired assessments discussed above, specifically, Dr. Jacques' Assessment and  
 10 the PVUSD 2008 Assessment. See Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3rd  
 11 Cir. 1995) (holding evidence "acquired after the school district's decision regarding [a  
 12 student's] need for special education" is to be "considered only with respect to the  
 13 reasonableness of the district's decision at the time it was made"); E.M., 652 F.3d at 1005  
 14 (citing favorably to Susan N.).

15 Dr. Jacques opined that, based on evaluations she conducted in December 2007,  
 16 E.M. "currently meets California Ed. Code criteria for a specific learning disability according  
 17 to the current assessment results." (See Dr. Jacques' 2007 Assessment at 9.) Her opinion  
 18 was based on the results of standardized tests she employed, and, in particular, on her  
 19 finding a 25-point difference between E.M.'s intellectual abilities and his achievements.  
 20 Specifically, Dr. Jacques reported that E.M. obtained a "high average Perceptual  
 21 Reasoning" score of 110 on the then current version of the Wechsler Intelligence Test for  
 22 Children, the "WISC-IV," and a "low average Verbal Comprehension" score of 85 on a  
 23 standardized ability test. (See id. at 5, 9.) Dr. Jacques also noted E.M. had been tested by  
 24 Dr. Wright in 2004, that Dr. Wright had administered the WISC-III, a prior version of the  
 25 Wechsler, and that Dr. Wright's results "did not provide the data necessary to make a  
 26 diagnosis under California Ed. Code as there were not significant discrepancies between  
 27 E.M.'s [ ] scores." (See id. at 8.) With reference to the difference in the results obtained by  
 28 Dr. Wright in 2004 and by herself in 2007, Dr. Jacques posed the question, "Why has the

1 gap widened between E.M.'s measured IQ scores and his achievement scores?," and then  
 2 answered, "[B]ecause of the proposed population advances in knowledge, the updated  
 3 tests are harder," and, "[p]robably more importantly for E.M., the increased academic load  
 4 in middle school and the cumulative experiences of failure have contributed to a widening  
 5 gap in his intelligence and achievement levels." (See id. at 9.)

6       The PVUSD 2008 Assessment, based in part on testing conducted approximately  
 7 two months after Dr. Jacques' testing by PVUSD and on PVUSD's consideration of prior  
 8 testing including the December 2007 testing by Dr. Jacques, concluded: "Based on current  
 9 test finding[s,] it is recommended that E.M. be considered for special education services  
 10 according to the Specific Learning Disability criteria whereby test results reveal severe  
 11 delays in auditory processing and cognitive fluency that adversely hinder his learning."  
 12 (See PVUSD 2008 Assessment at 31.)

13       E.M. argues the above assessments conducted, respectively, in late 2007 and  
 14 February 2008, demonstrate the results of Dr. Wright's 2004 testing were "anomalous" (see  
 15 Pl.'s Reply Brief on Remand at 14), and, consequently, that PVUSD acted unreasonably in  
 16 using the WISC-III results obtained by Dr. Wright when it made its assessments in 2004  
 17 and 2005. Further, E.M. argues, Dr. Jacques' 2007 Assessment establishes that E.M.  
 18 "always has had a 'severe discrepancy.'" (See Pl.'s Mem. of P. & A., filed February 21,  
 19 2008, at 10:21-23.) The Court, however, finds the later assessments do not support a  
 20 finding that, in 2004 and/or in 2005, PVUSD made unreasonable choices between valid but  
 21 conflicting test results, or that said assessments otherwise support the findings proposed  
 22 by E.M.

23       As Dr. Jacques noted, the results of testing conducted by Dr. Wright in 2004, using  
 24 WISC-III, showed "there were not significant discrepancies between E.M.'s [ability and  
 25 achievement] scores," whereas the K-ABC testing conducted by PVUSD in 2004 showed  
 26 "there was a significant discrepancy." (See Dr. Jacques' 2007 Assessment at 8.) Nothing  
 27 in Dr. Jacques' assessment, however, suggests she was of the view that the K-ABC results  
 28 accurately measured E.M.'s intelligence in 2004, or that the WISC-III results had not; that

1 issue was not addressed by Dr. Jacques. Rather, she limited the scope of her finding, that  
 2 a severe discrepancy existed, to the time of her evaluation, December 2007. (See id. at 9  
 3 (“E.M. currently meets California Ed. Code criteria for a specific learning disability  
 4 according to the current assessment results.”).)

5 Moreover, to the extent any inferences can be drawn from Dr. Jacques’  
 6 Assessment with respect to the reasonableness of PVUSD’s determinations in 2004/2005,  
 7 those inferences do not assist E.M. in meeting his burden of proof. First, Dr. Jacques  
 8 appears to have agreed with PVUSD that the WISC-III test was more reliable than the K-  
 9 ABC, as evidenced by Dr. Jacques’ decision to employ in her own testing of E.M. the  
 10 updated version of the WISC-III rather than the K-ABC test or any updated version thereof.  
 11 Second, Dr. Jacques appears to have acknowledged that between 2004 and December  
 12 2007, the “gap” between E.M.’s intelligence and achievement had in fact “widened.”<sup>11</sup> (See  
 13 id.)

14 Similarly, the PVUSD 2008 Assessment contains no language suggesting that  
 15 PVUSD’s 2004/2005 assessment was incorrect at the time. Nor does it include any  
 16 findings suggesting some circumstance existed in 2008 from which it can inferred that  
 17 PVUSD’s prior assessments in 2004 and 2005 were unreasonable. Moreover, the PVUSD  
 18 2008 Assessment is of limited relevance, because the issue of whether a “severe  
 19 discrepancy” existed between E.M.’s achievements and abilities was not an analysis  
 20 PVUSD was required to conduct in 2008, due to a change in law, nor did it conduct such an  
 21 analysis in 2008.<sup>12</sup>

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23 <sup>11</sup>As noted, Dr. Jacques attributed the difference between the results obtained by Dr.  
 24 Wright in 2004 and her results in 2007 to changes in the standardized tests, as well as to  
 25 factors specific to E.M., such as his having an “increased academic load,” given he was no  
 longer in primary school and was now in middle school. (See id. at 9.)

26 <sup>12</sup>Effective October 7, 2005, the Education Code was amended to provide that “in  
 27 determining whether a pupil has a specific learning disability . . . , a local educational  
 28 agency is not required to take into consideration whether a pupil has a severe discrepancy  
 between achievement and intellectual ability.” See Cal. Educ. Code § 56337(b) (Supp.  
 2012). E.M. “does not argue the retroactivity of this change” in the law. (See Pl.’s Mot. for  
 Summ. J., filed August 5, 2008, at 9:22-24.)

1           Accordingly, the Court finds E.M. has failed to show that PVUSD's assessments in  
 2 2004 and 2005 were unreasonable. See E.M., 652 F.3d at 1004 (holding school district  
 3 has duty to "make a reasonable choice between valid but conflicting test results in  
 4 determining whether a 'severe discrepancy' exists"); Hood, 486 F.3d at 1103 (9th Cir. 2007)  
 5 (holding, in IDEA action, "burden of proof in the district court rest[s] with the . . . party  
 6 challenging the administrative decision").

7 **B. Other Health Impairment**

8           As set forth above, a "child with a disability," for purposes of the IDEA, is a child who  
 9 is in need of special education services as a result of having an impairment falling within  
 10 one of the ten categories set forth in 20 U.S.C. § 1401(3)(A). Section 1401(3)(A) lists nine  
 11 defined categories, such as "intellectual disabilities," "serious emotional disturbance,"  
 12 "autism," and "specific learning disabilities," as well as a tenth category described more  
 13 broadly as "other health impairments." See 20 U.S.C. § 1401(3)(A). E.M. argues that his  
 14 auditory processing disorder qualifies as an "other health impairment."

15           At the time of the PVUSD assessments at issue herein, the Code of Federal  
 16 Regulations defined "other health impairment" as follows:

17           Other health impairment means having limited strength, vitality or alertness,  
 18 including a heightened alertness to environmental stimuli, that results in  
 limited alertness with respect to the educational environment, that --

19           (i) Is due to chronic or acute health problems such as asthma, attention deficit  
 20 disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart  
 condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever,  
 21 and sickle cell anemia; and  
 22           (ii) Adversely affects a child's educational performance.

23 See 34 C.F.R. § 300.7(c)(9) (2005).

24           During that same time period, a California state regulation provided that a pupil who  
 met the following criteria was entitled to special education services:

25           A pupil has limited strength, vitality or alertness, due to chronic or acute  
 26 health problems, including but not limited to a heart condition, cancer,  
 27 leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe  
 28 asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other  
 communicable infectious diseases, and hematological disorders such as  
 sickle cell anemia and hemophilia which adversely affects a pupil's

1 educational performance. In accordance with Section 5626(e) of the  
 2 Education Code, such physical disabilities shall not be temporary in nature as  
 3 defined by Section 3001(v).

4 See Cal. Code Regs. tit. 5, § 3030(f) (2005).<sup>13</sup>

5 In its opinion, the Ninth Circuit noted “[t]he regulations contain a non-exhaustive list  
 6 of chronic and acute health problems, which does not include auditory processing  
 7 disorder,” and directed this Court to consider “whether an auditory processing disorder may  
 8 qualify as an other health impairment.” See E.M., 652 F.3d at 1007. Accordingly, the  
 9 Court sees its task as interpreting the IDEA in light of the above-quoted regulations.

10 E.M. initially asserts that courts, as well as hearing officers conducting IDEA due  
 11 process hearings, have found auditory processing disorders do qualify as “other health  
 12 impairments,” and argues this Court should follow such authority. E.M., however, cites no  
 13 opinion by any judge or hearing officer that has so held,<sup>14</sup> and the Court has located none.  
 14 E.M. further asserts that his current school district determined his auditory processing  
 15 disorder qualifies as an “other health impairment”; E.M. offers no evidence, however, to  
 16 support such assertion.<sup>15</sup> In the absence of any authority or evidence of prior

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17 <sup>13</sup>Although § 3030(f) does not expressly employ the term “other health impairment,”  
 18 said regulation implements § 56026 of the California Education Code, see Cal. Code Regs.  
 19 tit. 5, § 3030 (2005); § 56026 defines “child with a disability,” for purposes of state law, as  
 having the same meaning as “child with a disability” under the IDEA, see Cal. Educ. Code  
 § 56026(a) (2005).

20 <sup>14</sup>Although some of the cases cited by E.M. were brought by students who had or  
 21 were alleged to have had an auditory processing disorder, see, e.g., Houston Indep. Sch.  
Dist. v. V.P., 582 F.3d 576, 581 (5th Cir. 2009), none includes a finding that an auditory  
 22 processing disorder is a qualifying “other health impairment,” as opposed to or in addition to  
 23 a “specific learning disability.” The only cited case even arguably supporting E.M.’s  
 24 assertion is a decision by a hearing officer, in which the hearing officer noted that a school  
 25 district had designated a student as “other health impaired” in light of a “central auditory  
 processing dysfunction” (see Pl.’s Req. for Judicial Notice Ex. A at 5); the hearing officer in  
 that case, however, did not determine whether or not the district’s designation was correct,  
 as the issues before the hearing officer did not pertain to whether the student was disabled,  
 but, rather, to the types of services to which the student was entitled.

26 <sup>15</sup>E.M. relies on a 2008 determination made by the Fullerton Joint Union High School  
 27 District (“FJUHSD”), E.M.’s present school district. (See Pl.’s Req. for Judicial Notice Ex.  
 28 C.) Specifically, the second page of an Individualized Education Program (“IEP”) prepared  
 by FJUHSD contains a section titled “Disability.” (See id.) In that section, FJUHSD  
 checked a box that reads “Specific Learning Disability” and also checked a box that reads  
 “Secondary Disability (if applicable).” (See id.) Next to the “Secondary Disability” box,

1 determinations, the Court considers the matter as one of first impression.

2 Statutes are “interpreted according to canons of construction.” See Black & Decker  
 3 Corp. v. Commissioner, 986 F.2d 60, 65 (4th Cir. 1993). The “tenets of statutory  
 4 construction apply with equal force to the interpretation of regulations.” See Boeing Co. v.  
 5 United States, 258 F.3d 958, 967 (9th Cir. 2001) (citing Black & Decker Corp., 986 F.2d at  
 6 65). In ascertaining the meaning of a federal statute, a court’s purpose is to “ascertain the  
 7 intent of Congress in enacting a particular statute.” See United States v. Daas, 198 F.3d  
 8 1167, 1174 (9th Cir. 1999). In so doing, the court first “look[s] to the plain language of the  
 9 statute” in light of the “entire statutory scheme.” See id. “If the statute uses a term which it  
 10 does not define, the court gives that term its ordinary meaning.” Id. “The plain meaning of  
 11 the statute controls, and courts will look no further, unless its application leads to  
 12 unreasonable or impracticable results.” Id. “If the statute is ambiguous — and only then —  
 13 courts may look to its legislative history for evidence of congressional intent.” Id. Similarly,  
 14 under California law, a court, in ascertaining the Legislature’s intent, “begins with the text of  
 15 a statute,” and a “statute’s words must be assigned their usual and ordinary meanings and  
 16 evaluated in context.” See Campbell v. Pricewaterhousecoopers, LLP, 642 F.3d 820, 826  
 17 (9th Cir. 2011). If the “plain meaning [of a California statute] is unambiguous, the inquiry  
 18 ends”; if the statute is ambiguous, a court “considers further interpretative aids” such as  
 19 “drafting history.” See id.

20 As set forth above, Congress, in enacting the IDEA, defined, in § 1401(3)(A), the  
 21 term “child with a disability,” and listed therein ten categories of disabilities, including  
 22 “specific learning disabilities” and “other health impairments.” See 20 U.S.C. § 1401(3)(A).

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23 FJUHSD wrote “280 Other Health Impairment (OHI).” (See id.) Nothing in the IEP  
 24 discusses the nature of either the “Specific Learning Disability” or the “Secondary  
 25 Disability,” and, consequently, the IEP does not support E.M.’s argument that FJUHSD  
 26 considers E.M.’s auditory processing disorder to be an “other health impairment.” Rather,  
 27 given that E.M. claims to have both an auditory processing disorder and ADD, it appears  
 28 more likely FJUHSD treated the former as the “Specific Learning Disability” and the latter  
 as the “Secondary Disability,” particularly given FJUHSD’s apparent acknowledgment of  
 both impairments. (See id., second of two pages numbered “15 of 16”); see also 34 C.F.R.  
 § 300.7(c)(9) (2005) (listing “attention deficit disorder” as example of health problem that  
 can qualify as “other health impairment”).

1 The IDEA does not itself further define the listed categories; rather, definitions of the  
 2 categories are set forth in federal and state regulations.

3 In the regulations, “specific learning disability” is defined to mean “a disorder in one  
 4 or more of the basic psychological processes involved in understanding or in using  
 5 language,” see 34 C.F.R. § 300.7(c)(10) (2005); Cal. Code Regs. tit. 5, § 3030(j) (2005),  
 6 provided such disorder results in a “severe discrepancy between [the child’s] intellectual  
 7 ability and achievement,” see Cal. Code Regs. tit. 5, § 3030(j) (2005); see also Cal. Educ.  
 8 Code § 56337 (2005). A “specific learning disability” thus is “specific” to disorders  
 9 adversely affecting the processing of the written and/or spoken word. As is set forth in the  
 10 applicable regulations, such processing disorders expressly include “auditory processing”  
 11 disorders. See Cal. Code Regs. tit. 5, § 3030(j)(1) (2005).

12 As defined in the regulations, an “other health impairment” is a “chronic and acute  
 13 health problem” that “[a]dversely affects a child’s educational performance.” See 34 C.F.R.  
 14 § 300.7(c)(9) (2005); see also Cal. Code Regs. tit. 5, § 3030(f) (2005) (providing pupil is  
 15 entitled to special education where pupil has “chronic and acute health problem[ ]” that  
 16 “adversely affects a pupil’s educational performance”). As the Ninth Circuit observed, the  
 17 regulations include non-exhaustive lists; those lists, when combined, provide the following  
 18 examples: asthma, attention deficit disorder or attention deficit hyperactivity disorder,  
 19 cancer, chronic kidney disease, cystic fibrosis, diabetes, epilepsy, a heart condition,  
 20 hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and  
 21 tuberculosis and other communicable infectious diseases. See 34 C.F.R. § 300.7(c)(9)  
 22 (2005); Cal. Code Regs. tit. 5, § 3030(f) (2005). As recognized in the regulations, what  
 23 each of these illnesses or medical conditions has in common is its potential to “limit[ ] [a  
 24 child’s] strength, vitality or alertness” as a matter of general “health.” See 34 C.F.R.  
 25 § 300.7(c)(9) (2005); Cal. Code Regs. tit. 5, § 3030(f) (2005).<sup>16</sup>

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26  
 27 <sup>16</sup>To the extent E.M. suggests the effects of attention deficit disorder (“ADD”) are  
 28 analogous to those caused by an auditory processing disorder, E.M. offers no support for  
 such comparison, and, indeed, the medical authority is to the contrary. See American  
 Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 85-86 (4th ed.

1       In sum, the regulations defining “specific learning disability” and “other health  
 2 impairment” pertain to two different categories of impairments.

3       E.M. argues the same impairment can qualify as both a “specific learning disability”  
 4 and an “other health impairment.” The plain meaning of “other,” however, is “another.”  
 5 See Webster’s II New College Dictionary 776 (1995). Consequently, the category “other  
 6 health impairments” necessarily consists of impairments not otherwise included in the  
 7 categories identified in § 1401(3)(A). Because a qualifying auditory processing disorder is  
 8 a specific learning disability, see 34 C.F.R. § 300.7(c)(10) (2005); see Cal. Code Regs. tit.  
 9 5, § 3030(j) (2005), it necessarily follows that an auditory processing disorder cannot at the  
 10 same time be an “other health impairment.”

11       A contrary finding would effectively negate and render superfluous the statutory and  
 12 regulatory provisions that a “disorder in a basic psychological process” qualifies as a  
 13 “specific learning disability” only if, as a result of such disorder, a “severe discrepancy”  
 14 exists between the child’s intellectual ability and academic achievement. See Cal. Educ.  
 15 Code § 56337 (2005); Cal. Code Regs. tit. 5, § 3030(j) (2005); see also Hart v. McLucas,  
 16 535 F.2d 516, 519 (9th Cir. 1976) (holding “in the construction of administrative regulations,  
 17 as well as statutes, it is presumed that every phrase serves a legitimate purpose and,  
 18 therefore, constructions which render regulatory provisions superfluous are to be avoided”).  
 19 If a “specific learning disability” were deemed to constitute an “other health impairment” as  
 20 well, a child with a specific learning disability would need to show only a generalized  
 21 “adverse[ ]” effect on academic performance. See 34 C.F.R. § 300.7(c)(9) (2005). As  
 22 PVUSD argued at the hearing, and E.M. did not dispute, the “adversely affects” standard  
 23 and the “severe discrepancy” standard are different. E.M. fails to explain why Congress,  
 24 for purposes of the IDEA, would have intended the same impairment be assessed under  
 25 two tests of differing magnitude.

26  
 27 \_\_\_\_\_  
 28 2000) (“Attentional and behavioral manifestations [of ADD] usually appear in multiple  
 contexts, including home, school, work, and social situations,” and cannot be diagnosed if  
 the manifestations are present in only one setting such as at a school.).

1 A child, of course, can have more than one impairment, each of which may  
2 independently qualify as a disability for purposes of § 1401(3)(A). For a qualifying  
3 impairment to be an “other” health impairment, however, it must be “another,” that is,  
4 different from an impairment recognized as falling within a specified category set forth in  
5 § 1401(3)(A).

6 Accordingly, the Court finds E.M. has failed to show an auditory processing disorder  
7 can qualify as an “other health impairment” for purposes of the IDEA.

## CONCLUSION

9 For the reasons stated above, PVUSD is entitled to judgment in its favor on E.M.'s  
10 remaining claims.

## 11 || IT IS SO ORDERED.

13 || Dated: March 16, 2012

*Maxine M. Chesney*  
MAXINE M. CHESNEY  
United States District Judge